

SERVICE DATE – SERVICE APRIL 28, 2014

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1115X

NEBRASKA CENTRAL RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
MERRICK COUNTY, NEB.

Decided: April 28, 2014

Nebraska Central Railroad Company (NCRC) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon the 1.81-mile rail line located between milepost 17.5, near Central City, and milepost 19.31, in Central City, Merrick County, Neb. Notice of the exemption was served and published in the Federal Register on March 28, 2014. (79 Fed. Reg. 17,650). The exemption is scheduled to become effective on April 29, 2014.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on April 4, 2014. In the EA, OEA stated that the Nebraska Department of Environmental Quality (NDEQ) indicated that any solid and hazardous waste generated or discovered during salvage activities related to the proposed abandonment must be characterized, handled, contained, and disposed as per Nebraska Titles 128 and 132. NDEQ also indicated that railroad crossties must be stored so as not to affect ground or surface water. NDEQ further stated that if greater than or equal to one acre of land disturbance would occur during salvage activities, authorization under National Pollutant Discharge Elimination System (NPDES) general permit NER 110000 would be necessary. OEA recommended that a condition be imposed requiring NCRC to consult with NDEQ prior to commencing any salvage activities to address NDEQ's concerns regarding solid and hazardous waste that might be generated or discovered during salvage activities, NCRC's handling of railroad crossties, and the applicability of NPDES permitting requirements related to the proposed salvage activities.

OEA stated that the U.S. Department of the Army Corps of Engineers, Omaha District (Corps) recommended coordination with its Werhspann Regulatory Office, because any proposed placement of dredged or fill material into waters of the United States (including jurisdictional wetlands) would require Corps authorization under Section 404 of the Clean Water Act. Accordingly, OEA recommended that a condition be imposed requiring NCRC to consult with the Corps prior to commencing any salvage activities to determine the applicability of Corps' requirements under Section 404 of the Clean Water Act.

OEA issued a Final EA on April 23, 2014, noting that no comments to the EA were received by the April 21, 2014 due date and recommending that the previously recommended environmental conditions be imposed. Accordingly, the conditions recommended by OEA in the Final EA will be imposed. Based on OEA's recommendation, the proposed abandonment, if

implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the line. On April 1, 2014, Nebraska Trails Foundation, Inc. (NTF), filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with NCRC for acquisition of the line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. Pursuant to 49 C.F.R. § 1152.29, NTF submitted a statement of its willingness to assume financial responsibility for the right-of-way and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. By response filed on April 8, 2014, NCRC has indicated its willingness to negotiate with NTF for interim trail use.

Because NTF's request complies with the requirements of 49 C.F.R. § 1152.29 and NCRC is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h); Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012). If no agreement is reached within 180 days, NCRC may fully abandon the line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject possible future reconstruction and reactivation of the right-of-way for rail service.

NTF also requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. NTF asks that NCRC be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that NCRC be barred from the removal or destruction of trail-related structures, such as bridges, culverts, ballast, and rip/rap, for a 180-day period from the effective date of the abandonment authorization. NTF's justification for its request is that these structures have considerable value for recreational trail purposes and that the 180-day period is needed to complete negotiations with NCRC.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C. 2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because NTF has satisfied these requirements, a 180-day public use condition will be imposed, requiring NCRC to keep intact the right-of-way (including trail-related structures such as bridges, culverts, ballast, and rip/rap) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the April 29, 2014 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. While both conditions will be imposed at this time, the public use condition will expire on October 26, 2014, but the trail use negotiating period will run 180 days from the service date of this decision and notice, until October 27, 2014. If a trail use agreement is reached on a portion of the right-of-way prior to October 26, 2014, NCRC must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NCRC is not required to deal exclusively with NTF, but may engage in negotiations with other interested persons.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on March 28, 2014, exempting the abandonment of the line described above, is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit NTF to negotiate with NCRC for trail use for the rail line for a period of 180 days from the service date of this decision and notice, until October 27, 2014, and to permit public use negotiations as set forth below for a period of 180 days from the April 29, 2014 effective date of the exemption, until October 26, 2014. The abandonment exemption is also made subject to the conditions that NCRC shall: (1) consult with NDEQ prior to conducting any salvage activities to address NDEQ's concerns regarding any solid and hazardous waste which might be generated or discovered during salvage activities, the handling of railroad crossties, and the applicability of NPDES permitting requirements; and (2) consult with the Corps prior to commencing any salvage activities to determine the applicability of Corps' requirements under Section 404 of the Clean Water Act.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, NCRC may discontinue service and salvage track and related materials. NCRC shall otherwise keep intact the right-of-way, including potential trail-related structures such as bridges, culverts, ballast, and rip/rap, for a period of 180 days (until October 26, 2014) to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way
4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in ordering paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by October 27, 2014, for the right-of-way, interim trail use may be implemented. If no agreement is reached, NCRC may fully abandon the line, upon expiration of the public use condition imposed here.

9. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.